NOV 3 / 2006
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No. 06-320

In the Supreme Court of the United States

ABLE BUILDING MAINTENANCE CO.,
Petitioner,

v.

BOARD OF TRUSTEES OF GENERAL EMPLOYEES TRUST FUND AND GENERAL EMPLOYEES TRUST FUND,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF IN OPPOSITION

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QUESTION PRESENTED

A self-executing arbitration clause empowers a party to proceed to arbitration without first obtaining a court order compelling arbitration, and to enable the arbitrator to reach a decision on the merits without the other party's participation. The sole question presented is:

Whether a party bound to an arbitration agreement with a self-executing arbitration clause, who receives notice and an opportunity to appear at an arbitration, conducted pursuant to California law, waives objections to the arbitrator's jurisdiction over a particular claim by failing to appear at the arbitration to raise such objections.

CORPORATE DISCLOSURE STATEMENT PURSUANT TO RULE 29.6

Respondent General Employees Trust Fund is a joint labor-management trust fund which provides health benefits to employees of contributing employers. Respondent Board of Trustees of General Employees Trust Fund is the Board which governs the General Employees Trust Fund. Neither Respondent is a corporation. Neither Respondent has a parent corporation. No publicly held corporation owns 10% or more of either Respondent.

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BRIEF IN OPPOSITION

I. SUMMARY OF REASONS TO DENY THE PETITION

Petitioner has not shown any legitimate reason for Supreme Court review.

The Ninth Circuit's ruling is properly based on California law, holding that a party to a self-executing arbitration agreement who seeks to challenge the arbitrability of a particular claim must appear at the hearing to state its challenge. Otherwise, its objection is deemed waived. This ruling is consistent with federal law. Moreover, the decision applies to the unique facts of this case, and does not have any far-reaching implications for other litigants. Thus, there is no important question of law involved.

Further, Petitioner has not shown any conflict in the decisions of the Circuits that would justify the Supreme Court's consideration.

II. STATEMENT OF THE CASE

A. TRUST FUND AUDITS

For many years, petitioner Able Building Maintenance Company ("Able") has been signatory to collective bargaining agreements covering its employees who perform janitorial and

other maintenance work. (ER[1] 41, ¶ 8.) By virtue of those collective bargaining agreements, Able has been bound to a trust agreement ("Trust Indenture") that obligates it to make payments to the respondent General Employees Trust Fund ("Trust Fund") for its employees' health coverage. (ER 3,¶ 6; 46-70.) To assure that the Trust Fund has sufficient monies to pay for employee health care expenses, the Trust Fund performs periodic audits to determine that employers have made proper payments.

Trust Fund audits revealed that Able had been making payments for a number of individuals who were not eligible for health coverage, some of whom were not even Able's employees.[2] Because Able had made contributions on their behalf, the Trust Fund had believed that these ineligible individuals were participants in its health plan, and had paid nearly half a million dollars in medical benefits for them. As soon as the auditors uncovered the error, the Trust Fund demanded payment of the difference between the amount paid by the Trust Fund for such medical benefits and the amount Able paid in improper contributions. Able refused to reimburse the Trust Fund.

B. ARBITRATION

In 1999, the Trust Fund scheduled an expedited arbitration, pursuant to Section 7.13 of the Trust Indenture,

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[1] "ER" refers to the Excerpts of Record, filed in the Ninth Circuit Court of Appeals.

[2] The audits also revealed that Able had not made all required payments. That portion of the audits is not the subject of the Ninth Circuit's ruling or of Able's Petition for Writ of Certiorari.

to determine how much Able owed the Trust Fund for items uncovered by the audits. (ER 85.) Section 7.13 contains comprehensive procedural provisions for expedited arbitrations. (ER 62-63, Resp. App.[3] 1a-2a.) Section 7.13(a) provides for written notice of the date, time and place of the arbitration hearing, and a default provision which states:

> If, after such notice, any employer fails to appear or show cause why the arbitration should not proceed, the arbitrator shall be and is hereby empowered to enter a default award against said employer which award shall include costs of collection, costs of the action, and fees including collection fees and attorney's fees.

Section 7.13(b) provides for the selection of an arbitrator without the employer's involvement. Section 7.13(c) provides, in pertinent part, that "[a]ll such arbitrations shall be conducted pursuant to the California Arbitration Act (CCP §§ 1280, et. seq.)." Section 7.13(d) sets forth provisions concerning the allocation of fees and costs for the arbitration.

Beginning in 1999, Able made numerous excuses for delaying the arbitration. (ER 86, 89, 91.) As a result of Able's stalling tactics, the arbitration was postponed repeatedly, and had to be noticed seven times before three different arbitrators. (ER 77-79, 85-89, 92-100.) After numerous delays, the arbitration hearing was set for November 15, 2002. (ER 77.)

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[3] "Resp. App." refers to the Appendix to this Opposition filed by Respondents. The full text of Section 7.13 of the Trust Indenture appears at Resp. App. 1a-2a.

On the eve of arbitration, Able had the hearing postponed again, purportedly to seek an injunction. (ER 77-78.) The Trust Fund was not notified of any legal proceeding to enjoin the arbitration, and the arbitration hearing was rescheduled for January 22, 2003. (ER 78.) After business hours on January 21, 2003, Able's attorney faxed a letter to the Trust Fund, stating that a complaint for injunctive relief was "out for service," and that, therefore, the arbitrator lacked jurisdiction. (ER 78.)

No one representing Able appeared for the arbitration hearing. Having determined that there were no legitimate grounds to justify cancelling the hearing, the arbitrator convened the hearing and proceeded to take evidence ex parte. (ER 79, 81.)

Thereafter, the arbitrator issued an arbitration award. (ER 71-83.) The arbitrator determined that the arbitration was conducted pursuant to Section 7.13 of the Trust Indenture to determine the validity of claims for delinquent contributions and whether Able had fully complied with all Trust Fund requirements. (ER 79:28-80:2.) The arbitrator concluded that Able owed a total of $765,037.07 plus interest. Even after the arbitrator's award, Able refused to pay the amount due, thus jeopardizing the solvency of the Trust Fund and placing the health benefits for proper plan participants at risk.

C. PROCEEDINGS BELOW

On June 20, 2003, Able filed suit in state court to bar the Trust Fund from recovering the monies found due in the arbitration. The Trust Fund removed the case to federal court, and filed a counterclaim and petition to confirm the

arbitration award. (CR[4] 39, ER 39-83.) The District Court for the Northern District of California confirmed the arbitration award with respect to unpaid fringe benefit contributions, but refused to confirm it with respect to monies found due on account of Able's payments for ineligible individuals, such as non-employees. (CR 85, ER 203-217.) According to the district court's Memorandum and Order, the dispute over claims for losses caused by Able's erroneous payments was not arbitrable because it was not encompassed by the arbitration clause which refers to "delinquent contributions." *Id.*

The Trust Fund appealed to the Ninth Circuit, asserting that all issues arising from the Trust Fund's audits were arbitrable. On March 31, 2006, the Ninth Circuit issued its decision in the form of an unpublished Memorandum, as defined in Ninth Circuit Rule 36-1. (Pet. App. 1a-5a.)[5] The Court held that "Able was given proper notice of the arbitration and the opportunity to participate, but chose not to appear." (Pet. App. 3a.) The Ninth Circuit stated that, "[b]y not participating in the arbitration proceeding . . ., Able waived any objection to the arbitrator's exercise of jurisdiction . . ." (Pet. App. 2a.) In so holding, the Court of Appeals relied on the fact that the arbitration was conducted "pursuant to a self-executing arbitration clause." *Id.* Accordingly, Able was required to "raise before the arbitrator any procedural objections, including those relating to the

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[4] "CR" refers to the Clerk's Record, as set forth on the district court's docket sheet, which begins at page 223 of the Excerpts of Record.

[5] "Pet. App." refers to the Appendix to Able's Petition for Writ of Certiorari.

arbitrator's jurisdiction over a particular claim, in order to preserve those objections for judicial review." *Id.*

The Ninth Circuit applied existing precedent to the facts of the instant case in determining that the arbitration was conducted pursuant to a self-executing arbitration clause. (Pet. App. 2a.) As the Court stated:

> "A 'self-executing' arbitration clause is one which permits and provides for arbitration under rules therein incorporated" without the need for a prior court order. *Mitchum, Jones & Templeton, Inc. v. Chronis*, 72 Cal.App.3d 596, 601 (1977); *see also Nat'l Marble Co. v. Bricklayers & Allied Craftsmen*, 184 Cal.App.3d 1057, 1063 (1986) (stating an agreement's "provisions are self-executing in . . . that they set forth, without the necessity of resort to extrinsic material, the procedure to be followed . . . in deciding contractual disputes"). (Pet. App. 4a.)[6]

The Ninth Circuit relied on California law because, pursuant to Sections 7.13(c) and 8.5[7] of the Trust Indenture,

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[6] Where there are discrepancies between the original Memorandum issued by the Ninth Circuit and the copy of the Memorandum included in the Appendix to the Petition, the wording of the actual Memorandum is used here.

[7] Section 8.5 of the Trust Indenture provides that all questions pertaining to the Trust Indenture and the Trust Fund shall be determined "in accordance with the laws of the State of California" and the provisions of ERISA. (ER 64, Resp. App. 3a.) The full text of Section 8.5 appears in the Appendix to this Opposition at Resp. App. 3a.

the arbitration had been conducted under California law. Accordingly, the Ninth Circuit held:

> Under California law, when an arbitration is conducted pursuant to a self-executing arbitration clause, as occurred here, a party with notice and opportunity to appear must raise before the arbitrator any procedural objections, including those relating to the arbitrator's jurisdiction over a particular claim, in order to preserve those objections for judicial review. Otherwise, the objections are waived. *See Nat'l Marble Co. v. Bricklayers & Allied Craftsmen,* 184 Cal.App.3d 1057, 1063-64 (1986); *cf. United Steelworkers of Am. v. Smoke-Craft, Inc.*, 652 F.2d 1356, 1360 (9th Cir. 1981) (finding, in a challenge to an arbitration that proceeded under federal law, that a party cannot raise in a confirmation proceeding procedural objections to an arbitration that it had failed to raise before the arbitrator because an objecting party has "an affirmative obligation to present to the arbitrator any arguments why the arbitration should not proceed. Parties to arbitration proceedings cannot sit idle while an arbitration decision is rendered and then, if the decision is adverse, seek to attack the award collaterally on grounds not raised before the arbitrator."). (Pet. App. 2a-3a, footnotes omitted.)

The Ninth Circuit reaffirmed its decision by summarily denying a petition for rehearing. (Pet. App. 27a.)

III. REASONS FOR DENYING THE PETITION

In its Petition for Writ of Certiorari, Able maintains that Supreme Court review is warranted because the Ninth Circuit's decision presents an important question of federal law, conflicts with other Ninth Circuit decisions and conflicts with decisions of other Courts of Appeal. (Pet.[8] 5-7, 11-14.) In truth, review is not justified for any reason.

United States Supreme Court Rule 10 states: "Review on a writ of certiorari is not a matter of right, but of judicial discretion. A petition for a writ of certiorari will be granted only for compelling reasons." Accordingly, the Supreme Court grants certiorari in only a limited number of cases. As stated in *Magnum Import Co. v. Coty*, 262 U.S. 159, 163 (1923):

> The jurisdiction to bring up cases by certiorari from the Circuit Courts of Appeals was given for two purposes, first to secure uniformity of decision between those courts in the [then] nine circuits, and second, to bring up cases involving questions of importance which it is in the public interest to have decided by this Court of last resort. The jurisdiction was not conferred upon this Court merely to give the defeated party in the Circuit Court of Appeals another hearing.

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[8] "Pet." refers to Able's Petition for Writ of Certiorari.

A. THIS CASE DOES NOT PRESENT ANY IMPORTANT QUESTION OF LAW

1. The Ninth Circuit's Ruling Does Not Involve Any Question of Public Interest.

The Ninth Circuit's unpublished decision in this case turns on its own facts. Specifically, the Ninth Circuit relied on the following facts which are unique to this case: (1) the language of the Trust Indenture which requires application of California law; (2) the language of the Trust Indenture which sets forth detailed arbitration procedures, including procedures for the selection of the arbitrator without the employer's participation; (3) the default provision in the Trust Indenture's arbitration clause; (4) the self-executing arbitration clause in the Trust Indenture; (5) the fact that Able received proper notice and an opportunity to appear at the arbitration hearing; and (6) the fact that Able did not appear at the arbitration hearing to object to the arbitrator's exercise of jurisdiction over the claim arising from the improper contributions. Because this decision is based on the particular facts of this case, the decision is unlikely to affect other litigants. Thus, although this case is important to the parties, it has no significance for the public at large.

Able contends that this case presents an important question of federal law because parties will not know how to preserve the issue of arbitrability. (Pet. 5-7.) In support of this contention, Able argues that there is a conflict between the Ninth Circuit's decision in *George Day Constr. Co. v. United Bhd of Carpenters & Joiners, Local 354*, 722 F.2d 1471 (9th Cir. 1984) and the Ninth Circuit's ruling in this case. (Pet. 7.) As shown below, no such conflict exists. See Section III, B, 1, *infra*. Even if such a conflict did exist, an intra-Circuit conflict is not the type of significant issue that warrants

Supreme Court review. *Wisniewski v. United States*, 353 U.S. 901, 902 (1957).

Able also suggests that the Ninth Circuit's ruling presents an important question of federal law because, according to Able, the ruling conflicts with the Supreme Court's decisions in *Steelworkers v. American Mfg. Co.*, 363 U.S. 564 (1960), *Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960), *Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960), *A T & T Technologies v. Communications Workers*, 475 U.S. 643 (1986), and *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938 (1995), which hold that a party cannot be compelled to arbitrate a dispute it has not agreed to arbitrate. (Pet. 5.) On the contrary, the Ninth Circuit's decision does not conflict with any ruling of the Supreme Court.

Able concedes that it is bound to the Trust Indenture containing the arbitration agreement. (Pet. i, 2.) The Trust Indenture has a self-executing arbitration clause, a fact which Able does not deny.

> Where an arbitration proceeds under a self-executing agreement without a preliminary court order, the objecting party is *required* to participate in the proceeding and then raise his objections by petition to vacate the award or by opposition to a petition to confirm.

Nat'l Marble Co. v. Bricklayers & Allied Craftsmen, Local No. 2, 184 Cal. App. 3d 1057, 1064 (1986) (emphasis added) (citations omitted). Thus, under the arbitration agreement to which Able agreed, if Able sought to contest arbitrability of a particular dispute, it was obligated to appear at the arbitration hearing and specifically reserve that question for determination by the courts. *George Day*, 722 F.2d at 1475.

Just as in *George Day*, the employer here (Able) "agreed to the default provision in the [Trust Indenture]. The employer cannot be heard to complain on fairness grounds about ramifications arising out of a contractual provision to which it knowingly assented." *Id.* at 1476. Accordingly, Able may not now complain that it did not agree to arbitrate any issue arising out of the Trust Fund's audits.

Able also argues that the Supreme Court should grant its Petition because the Ninth Circuit based its decision on California law rather than federal law. (Pet. 8-10.) This argument lacks any merit. The Ninth Circuit properly applied California law in this case. The Trust Indenture to which Able agreed provides that California law is controlling. Section 8.5 of the Trust Indenture provides generally that all questions pertaining to the Trust Fund and the Trust Indenture shall be determined "in accordance with the laws of the State of California." (Resp. App. 3a.) Section 7.13(c) of the Trust Indenture specifically provides that arbitrations, such as that at issue here, are to be conducted under the California Arbitration Act. (Resp. App. 2a.) Thus, Able agreed that all issues concerning the application and interpretation of the Trust Indenture and pertaining to the Trust Fund would be decided under California law. Accordingly, the arbitration was properly conducted under California law. In any event, the use of California law does not present any grounds for Supreme Court review.

2. The Ninth Circuit's Ruling Is Not Published.

The Memorandum issued by the Ninth Circuit Court of Appeals is not a published decision. Above the caption on the Memorandum is this admonition: "NOT FOR

PUBLICATION."[9] Further, the following statement appears at the bottom of the Memorandum's cover sheet: "This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by Ninth Circuit Rule 36-3."[10]

An unpublished decision cannot be cited. Therefore, it cannot impact the disposition of other cases. Thus, regardless of the substance of the decision, the unpublished Memorandum does not raise a question of importance that necessitates resolution by the Supreme Court.

Moreover, the fact that the Ninth Circuit's disposition was not designated as an "Opinion" suggests that it neither "[e]stablishes, alters, modifies or clarifies a rule of law" nor "[i]nvolves a legal or factual issue of unique interest or substantial public importance." (Ninth Cir. Rule 36-2.) Otherwise, the decision would have been designated as an Opinion, not a Memorandum.

Respondents are not unmindful that the Supreme Court sometimes reviews unpublished opinions where, for example,

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[9] The words "NOT FOR PUBLICATION" were omitted from the copy of the Memorandum included in the Appendix to the Petition. However, the copy of the Memorandum included in Petitioner's Appendix does contain the following: "NOTICE: RULES OF THE NINTH CIRCUIT COURT OF APPEALS MAY LIMIT CITATION TO UNPUBLISHED OPINIONS. PLEASE REFER TO THE RULES OF THE UNITED STATES COURT OF APPEALS FOR THIS CIRCUIT." (Pet. App. 1a-2a.)

[10] This statement is included in the copy of the Memorandum contained in Petitioner's Appendix at the bottom of page 3a, but not on the cover sheet as it appears on the actual Memorandum.

the Court of Appeals has exceeded its jurisdiction. *Comm'r v. McCoy*, 484 U.S. 3 (1987). However, it is not alleged in the instant case that the Ninth Circuit exceeded its jurisdiction. For the reasons explained above, the issues involved in this unpublished decision are not sufficiently important to the public to warrant the Supreme Court's consideration.

B. NO CONFLICT ESTABLISHES A BASIS FOR GRANTING CERTIORARI.

1. An Intra-Circuit Split Does Not Exist.

Able's primary argument is that there is a conflict between the Ninth Circuit's decision in this case, on the one hand, and its decisions in *George Day Constr. Co. v. United Bhd. of Carpenters & Joiners, Local 354*, 722 F.2d 1471 (9th Cir. 1984), *Carpenters 46 N. Cal. Counties Conference Bd. v. Zcon Builders*, 96 F.3d 410 (9th Cir. 1996), and *Pacesetter Constr. Co. v. Carpenters 46 N. Cal. Counties Conference Bd.*, 116 F.3d 436 (9th Cir. 1997), *cert. denied*, 522 U.S. 1014 (1997), on the other.

An intra-Circuit conflict is not a sufficient basis for granting certiorari. *See Davis v. United States*, 417 U.S. 333, 340 (1974). The Supreme Court has held that "[i]t is primarily the task of a Court of Appeals to reconcile its internal difficulties." *Wisniewski v. United States*, 353 U.S. 901, 902 (1957).

Moreover, there simply is no intra-Circuit conflict. In *George Day*, 722 F.2d at 1475, the Ninth Circuit held that a party may preserve its objections to arbitrability by appearing at the arbitration hearing and making an express reservation of the question of arbitrability. The employers in *George*

Day, 722 F.2d 1471, and *Pacesetter Constr. Co.*, 116 F.3d 436, were held to have consented to arbitrability not because they appeared at the hearing, but because they appeared and argued the merits of the dispute without reservation. In *Zcon Builders*, 96 F.3d 410, the Ninth Circuit held that the employer had properly reserved the arbitrability issue. If Able had appeared at the arbitration and objected to the arbitrator's jurisdiction to decide the claim for losses from improper contributions without arguing the merits, Able's objection would have been preserved. The Ninth Circuit decision in this case is thus consistent with the cases cited by Able in that it holds that Able's *failure* to appear for arbitration constituted a waiver of its arbitrability argument. Thus, there is no conflict between the Ninth Circuit's ruling in the instant case, where Able failed to appear, and its rulings in the cases on which Able relies, where the employers appeared. The cases are distinguishable on their facts.

Significantly, Able's Petition ignores the fact that the Ninth Circuit's decision is premised on the existence of a self-executing arbitration clause. Neither *George Day* nor any of the other cases cited by Able involves, or even mentions, a self-executing arbitration clause. And, Able does not point to any case where the Ninth Circuit issued a contrary decision with respect to a self-executing arbitration clause.

2. An Inter-Circuit Split Does Not Exist.

Able has not shown that this case involves a conflict among Circuit Courts about an important federal question. In support of its argument that there is a split in the Circuits, Able cites *United Indus. Workers v. Gov't of Virgin Islands*, 987 F.2d 162 (3d Cir. 1993) and *Piggly Wiggly Operators' Warehouse, Inc. v. Piggly Wiggly Operators' Warehouse*

Indep. Truck Drivers Union, Local No. 1, 611 F.2d 580 (5th Cir. 1980), both of which are consistent with *George Day*. They both hold that if an arbitrability issue is submitted to an arbitrator without reservation, any objection to the arbitrator's jurisdiction is waived. For the reasons discussed in Section III, B, 1, *supra*, there is no conflict between the Ninth Circuit's decision in the instant case and its decision in *George Day*. Accordingly, there is no conflict between the Ninth Circuit's decision in the instant case and the cited Third Circuit and Fifth Circuit decisions.

Able also cites *General Motors Corp. v. Pamela Equities Corp.*, 146 F.3d 242 (5th Cir. 1998), a commercial arbitration case, for its Circuit-split argument. In *General Motors*, the Fifth Circuit held that *George Day* was not the appropriate precedent after the Supreme Court's decision in *First Options of Chicago v. Kaplan*, 514 U.S. 938. However, in the labor arbitration context, *George Day* survives *First Options*. *Pacesetter Constr. Co. v. Carpenters*, 116 F.3d at 438-40.

In any event, Able does not point to any decision in any Circuit that is inconsistent with the Ninth Circuit's ruling here regarding the effect of a self-executing arbitration clause. The prevailing law is that an employer bound by a self-executing arbitration clause must raise objections to arbitrability before the arbitrator. The employer may do so by attending the hearing for the express purpose of reserving the issue for judicial review. However, if the employer fails to attend the hearing or attends and fails to reserve the issue, its objections are waived.

C. THE NINTH CIRCUIT'S DECISION IS CORRECT

The Trust Indenture provides generally that California law applies to all questions pertaining to the Trust Indenture and the Trust Fund. (Resp. App. 3a.) The Trust Indenture also provides specifically that arbitrations are conducted pursuant to the California Arbitration Act. (Resp. App. 2a.) Accordingly, the Ninth Circuit correctly relied on California law.

The Court of Appeals properly held that where, as here, a party is bound by a self-executing arbitration clause, and receives notice of an arbitration, that party may not refuse to attend the arbitration and sit idly by to contest the arbitrator's jurisdiction over a particular claim if the arbitration award is adverse. Under a self-executing arbitration clause, if a party to the agreement does not raise before the arbitrator any objection to the arbitrator's jurisdiction over a particular claim, its objections are waived. *Nat'l Marble Co. v. Bricklayers & Allied Craftsmen, Local No. 2*, 184 Cal.App.3d 1057, 1063 (1986).

The same is true under federal law. A self-executing arbitration clause "purports to empower [a party] to proceed to arbitration against another party without first obtaining a court order compelling arbitration, and to enable the arbitrator to reach a decision on the merits without the [other party's] participation." *Orion Pictures Corp. v. Writers Guild of America, West, Inc.*, 946 F.2d 722, 723 (9th Cir. 1991). *See also Toyota of Berkeley v. Automobile Salesman's Union, Local 1095*, 834 F.2d 751 (9th Cir. 1987), *cert. denied*, 486 U.S. 1043 (1988). Thus, the Ninth Circuit's ruling is correct under federal law as well as California law.

Moreover, "a petition for a writ of certiorari is rarely granted when the asserted error consists of . . . the misapplication of a properly stated rule of law." Sup. Ct. R. 10. As the United States Supreme Court has explained, the "Court's review . . . is discretionary and depends on numerous factors other than the perceived correctness of the judgment we are asked to review." *Ross v. Moffitt*, 417 U.S. 600, 617 (1974).

Furthermore, the Supreme Court will not ordinarily grant certiorari to review questions of state law decided by federal courts of appeal. *Huddleston v. Dwyer*, 322 U.S. 232, 236 (1944). *See also United States v. Frady*, 456 U.S. 152, 159 n.8. (1982); *Butner v. United States*, 440 U.S. 48, 58 (1979). The Supreme Court is highly deferential to the determinations of the courts of appeal on issues of state law. *Pembaur v. City of Cincinnati*, 475 U.S. 469, 485 n.13 (1986).

IV. CONCLUSION

Petitioner has not established any compelling reason for this Court to grant the Petition. Therefore, Respondents respectfully request that the Petition for Writ of Certiorari be denied.

Respectfully submitted,

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RESTATED TRUST INDENTURE PROVIDING FOR GENERAL EMPLOYEES TRUST FUND
Effective February 1, 1973
(and Restated July 1, 1999)

Section 7.13. Expedited Arbitration. The trustees, in their sole discretion and pursuant to procedures established by them, may refer any claim against an employer for delinquent contributions to final and binding expedited arbitration subject to the following:

(a) Prior to referral to arbitration, an employer shall receive a ten (10) day written notice of claimed delinquency. If no settlement is reached during such period, the employer shall be notified either by personal service or certified mail of the trustees' referral of the claim to arbitration, and such notice shall contain the date, time and place set for the arbitration hearing. If, after such notice, any employer fails to appear or show cause why the arbitration should not proceed, the arbitrator shall be and is hereby empowered to enter a default award against said employer which award shall include costs of collection, costs of the action, and fees including collection fees and attorney's fees.

(b) The arbitrator for each case referred to arbitration shall be selected from a panel appointed by the American Arbitration Association. The trustees will maintain a current list of the panel at the offices of their administrator. The American Arbitration Association shall fill any vacancy which may occur on the panel. Cases shall automatically be assigned to the arbitrators in the order their names are listed; provided that, in the discretion of the trustees, the arbitrator who is next in order at any time may be assigned more than one case to

be heard on the same or succeeding days; and provided further that if the arbitrator next in order is unavailable then the case or cases referred to the arbitration shall be assigned to the available arbitrator next following in order.

(c) The arbitrations hereunder shall be conducted in an expedited manner and no transcripts shall be prepared or briefs filed. The arbitrator's award shall be in writing and shall be issued no later than ten (10) days following the close of the hearing. All such arbitrations shall be conducted pursuant to the California Arbitration Act (CCP §§ 1280, et. seq.).

(d) All arbitration awards shall provide that the loser shall pay all costs, including the arbitrator's fees. If the arbitrator rules that any contributions are delinquent or that the employer has not fully complied with all trust fund requirements, the employer shall be deemed the "loser" for purposes of this provision.

RESTATED TRUST INDENTURE PROVIDING FOR GENERAL EMPLOYEES TRUST FUND
Effective February 1, 1973
(and Restated July 1, 1999)

Section 8.5. California Law Applicable. This plan, trust indenture, and trust fund, are consummated and established in the State of California and are intended to fully comply with the applicable provisions of ERISA. All questions pertaining to them and their validity, administration and construction shall be determined in accordance with the laws of the State of California, the provisions of the ERISA, and such express intent of compliance.